

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CRISTIAN AGUILON CABRERA,

Defendant and Appellant.

B292040

(Los Angeles County  
Super. Ct. No. BA458426)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. David Herriford, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Steven E. Mercer and Michael C. Keller,  
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Cristian Aguilon Cabrera appeals his conviction of unlawful sexual penetration, in violation of Penal Code section 289, subdivision (a)(1)(A).<sup>1</sup> He contends that the trial court prejudicially erred in denying his *Miranda*<sup>2</sup> motion to suppress his confession. Finding no merit to defendant's contention, we affirm the judgment.

### **BACKGROUND**

Defendant was charged with sexual penetration by a foreign object, in violation of section 289, subdivision (a)(1)(A). A jury convicted defendant as charged, and on August 2, 2018, the trial court sentenced him to the middle term of six years in prison. The trial court ordered defendant to pay a \$300 restitution fine and a parole revocation fine in the same amount, which was stayed pending successful completion of parole. In addition, the court imposed a court operations fee of \$40, a criminal convictions facilities assessment of \$30, and a sex offender fine of \$300, plus penalty assessment. The court found that defendant had the ability to pay the fines ordered as he was working at the time of the offense.

Defendant filed a timely notice of appeal from the judgment.

#### **Prosecution evidence**

Brittany K. testified that on the evening of June 19, 2017, she was walking alone in her neighborhood, wearing headphones. While she was on Franklin Avenue, walking toward Normandie

---

<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Avenue, she noticed a man she had never seen before, trying to get her attention by waving his arms. In court she identified defendant as that man. Brittany kept walking but defendant walked with her, so she eventually took off her headphones, but did not stop walking. Defendant came within about two feet of her and asked her for directions to Normandie Avenue and First Street. He appeared to be drunk, swaying, with slurred speech, and mumbling in broken English. Brittany pointed to Normandie Avenue, which was less than a block away. Since First Street was a distance away, she suggested he take a taxi. Defendant kept following her, and soon he began saying such things as, "Will you fuck me?" or, "I pay you to fuck me." She said no and continued walking, but defendant continued to follow her, repeating his proposition. When Brittany reached Normandie Avenue, she began walking back to her apartment. Defendant followed her as she crossed the street and headed back home.

As defendant drew closer to her, he brushed up against her. Brittany walked faster, but defendant kept the same pace. There was no one else around and Brittany became concerned, so she called 911. She called several times, but each time she reached an automated voice system. She continued walking while calling 911, and all the while defendant continued asking her if she would fuck him. When she reached her street, she stopped, not wanting to lead him to her apartment. At the corner she pivoted around street sign and held on to it, but defendant grabbed her and pushed her against either a vine-covered wall or bushes. She screamed for help as she tried to push him away while still holding her phone in one hand. Defendant became more aggressive, using more physical force as he grabbed her chest and

pushed himself up against her. He eventually undid her jeans and put his hand down her pants. She kept screaming as she tried to push him away. Defendant was stronger than she and he held her with her back against the bushes. He forced his hand into her underwear, and although she tried to hold her legs tightly closed, he forced his fingers into her vagina.

A car then pulled up, its headlights flashed at them, and defendant pulled out his fingers and ran off. Brittany then realized that a 911 operator was on the line. She described defendant and told the operator the direction in which he had run. A couple got out of the car that had pulled over, and stayed with her until the police arrived. The recording of the 911 call was played for the jury. At the beginning of the call, before Brittany began speaking to the operator, she is heard saying, "Let me go," and repeating, "Let me go." She then tells the operator that she is being molested, gives the location, and then she is heard to say, "Ow. Get off me. Oh my god." After a short explanation of what happened, Brittany tells the operator that he is running toward Hollywood Boulevard.

Los Angeles Police Officer Ivan Salcedo and his partner were on patrol in the area, when, at about 10:38 p.m., they heard a radio call about the attack, which included a description of the suspect and the area in which he was last seen. They soon observed defendant, who matched the description of the suspect. They detained him and when he was patted down for weapons, the officers saw that his pants zipper was down and his boxer shorts were showing. The officers held defendant in that location while other officers brought Brittany there for a field showup. She positively identified defendant as her assailant.

Officers transported Brittany to a rape treatment center for a sexual assault examination by nurse practitioner, Lauren Drummey. Drummey testified that she took a medical history and Brittany's account of the events. She was told that Brittany's assailant pushed Brittany into the bushes, physically restrained her, kissed her neck, and digitally penetrated her vagina. The physical examination revealed that Brittany had an actively bleeding laceration on the border of her clitoral hood and the labia minora. There was also some bruising to the area. Brittany also complained of pain and tenderness in that area. Some blood was located three or four inches into the vagina at the cervix, attributable to the end of Brittany's menstrual cycle. The nurse found the injuries consistent with Brittany's history and description of the events.

Brittany testified that prior to the assault, she had no injuries to her vaginal or genital area. She had her menstrual period a week earlier, and it had ended. As a result of defendant's grabbing her and forcing her against the wall, Brittany also had bruising on her forearm, bicep, tricep and elbow.

Defendant was also transported to the rape treatment center for a physical examination by a sexual assault nurse practitioner. Swabs were taken for purposes of DNA testing, including from defendant's fingernails.

Shortly after 10:00 a.m. the next morning, Detective Alicia Camarillo went to meet defendant at the Hollywood police station where he was being held. She took defendant into an interview room, read him his *Miranda* rights in Spanish, and he agreed to speak to her. The interview was recorded and the recording was played for the jury. Defendant said he had been drinking with a

coworker that evening and had become very drunk. When he left, he intended to go to an area where he had been told he could find a woman for sex. As he was walking, he saw the woman who called the police. He asked her for directions, and then asked her if she wanted to have sex with him. She said no, and he offered to pay, but she said no again. Defendant then said to Detective Camarillo, "I don't know what came over me" and "I tried to rape her." He said he grabbed her, put his arms around her, and put his hand inside her clothes. Detective Camarillo asked defendant whether he put his fingers into her vagina. At first he replied that he did not remember, but he believed he did, and then he told the detective that he put two fingers into the woman's vagina and moved them inside her while she screamed for help. After about a minute, he ran away. The police found him about five minutes later.

DNA testing revealed Brittany's DNA on a swab taken from defendant's fingernail. Though DNA analyst Quang Nguyen could not definitively say what part of the body the sample came from, he opined that it most likely came from bodily fluids as a result of the fingers having been inserted into the vagina. He testified that it was extremely unlikely that the victim's DNA transferred to the fingernail just through grabbing her waist and arms.

## **DISCUSSION**

Defendant contends that the trial court erred in denying his motion to suppress his confession, resulting in a violation of his Fifth and Fourteenth Amendment right against self-incrimination.

"Prior to any questioning, the [accused] must be warned that he has a right to remain silent, that any statement he does

make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” (*Miranda, supra*, 384 U.S. at p. 444.) In order to protect the Fifth Amendment right against self-incrimination, such procedural safeguards are required “to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored.” (*Id.* at pp. 478-479.)

At the hearing on defendant’s motion to exclude his confession, Officer Salcedo testified that he and his partner were dispatched to the scene of the attack in progress with a description of the suspect. Defendant, who fit the description given, was spotted about 100 feet south of the crime scene. The officers detained defendant, but asked him no questions except where he was going. Defendant replied and they did not question him further. After the victim made a positive identification at the field showup, Officer Salcedo placed defendant under arrest. Defendant was then transported to the Hollywood station for booking approval and then taken to the hospital for the sexual assault examination.

Officer Chas Maloch testified that he assisted Officer Salcedo in transporting defendant to the police station and then to the rape treatment center. After the sexual assault exam, defendant was returned to the station at about 1:44 a.m. on June 20. Officer Maloch did not conduct any questioning of the defendant during the transports, and neither he nor his partner could speak Spanish. At the station, Officer Antonio Razo assisted by reading the *Miranda* form to defendant in Spanish. As defendant declined to answer questions, no questioning took place. Defendant was booked into jail at 2:50 a.m., and Officer Maloch had no further contact with him.

Officer Razo testified that he was a certified Spanish speaker, and read defendant his *Miranda* rights from Form No. 15.03, translating them into Spanish, on June 20, 2017, at approximately 1:44 a.m. Defendant said in Spanish that he understood his rights. Officer Razo testified that he asked defendant if he wanted to talk about what happened, to which defendant said, “No.” Officer Razo then walked away. Neither he nor any other officer asked defendant any further questions. Defendant had not been threatened in any way and no weapons were pointed at him.

Detective Camarillo testified that she was assigned to investigate the case on June 20, 2017, and at approximately 10:00 a.m. She reviewed Officer Salcedo’s report and learned that defendant had invoked his right to remain silent. She then went to the defendant’s cell to introduce herself. Defendant was not handcuffed, but his cell was closed and locked. Detective Camarillo wore plain clothes and a visible badge. She carried no weapon. She told defendant her name and that she was from the police, there to investigate his case. Defendant’s first reply was to say in Spanish, “I know what I did was bad” or “wrong.” She then said to him, “Oh, did you want to talk?” Defendant replied that he did, so she took him to an interview room at the station at approximately 10:13 a.m. Their conversation at defendant’s cell had lasted only a couple minutes.

Once in the interview room, Detective Camarillo, a certified Spanish speaker, first read Form 15.03 to defendant in Spanish. After reading defendant his rights, which she read for the court in English, she asked him, “Do you understand?” Defendant replied, “Yes,” and Detective Camarillo said, “Do you want to speak with me about what happened or about what you know?”



and defendant said, “Yes.” Detective Camarillo then asked defendant whether he wanted to talk, to tell his side of the story. He said, “Yes. Yes. I would like to talk,” and then spoke about what happened the night before. Detective Camarillo testified that she did not make any promises, threaten him, or point a weapon at him, either when she introduced herself, when she began the interview, or during the course of the interview, which lasted approximately 30 minutes. Though the formal interview was recorded, no recording was made of their conversation at the cell.

Relying on *Michigan v. Mosley* (1975) 423 U.S. 96 (*Mosley*), and *People v. Warner* (1988) 203 Cal.App.3d 1122 (*Warner*), the trial court denied defendant’s motion. In *Mosley*, the United States Supreme Court noted that under *Miranda*, “[o]nce warnings have been given, [and] the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” (*Id.* at pp. 100-101, quoting *Miranda*, at pp. 473-474.) *Mosley* added, however, that *Miranda* cannot “sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.” (*Mosley*, at pp. 102-103, fn. omitted.) Rather, statements obtained after an invocation of the right to remain silent are admissible when a review of all the circumstances show that the person’s “‘right to cut off questioning’ was ‘scrupulously honored,’” meaning “‘fully respected.”’ (*Id.* at p. 104, fn. omitted.)

Thus, admissibility presents a factual issue to be determined from the *totality* of the circumstances. (*Warner*, *supra*, 203 Cal.App.3d at p. 1129; see *Mosley*, *supra*, 423 U.S. at

p. 104.) “An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court’s granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court’s underlying decision entails a measurement of the facts against the law. [Citations.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) “We accept factual inferences in favor of the judgment or order below, even when we must independently review the legal conclusion the trial court has drawn. [Citations.]” (*People v. Stansbury* (1995) 9 Cal.4th 824, 831.)

In *Mosley*, after the defendant was arrested in connection with several robberies and properly informed of his *Miranda* rights, he stated that he did not want to answer any questions about the robberies, and police questioning immediately ceased. (*Mosley, supra*, 423 U.S. at p. 104.) Two hours later, a different detective gave the defendant full and complete *Miranda* warnings a second time, and questioned him about a different, unrelated crime, to which he confessed. (*Ibid.*) The Supreme Court found the confession admissible, as “the police . . . immediately ceased the [first] interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.” (*Id.* at pp. 105-106.)

Similarly in this case, there was no questioning after defendant was given the first *Miranda* warnings and defendant’s invocation of his rights. Then, about eight hours, a significant period of time, passed between the first warnings by Officer Razo and the interview with Detective Camarillo, who provided defendant with a fresh set of warnings.

Defendant argues that *Mosley* does not support admissibility, because there the second interview was about a different crime, whereas here, the subject of Detective Camarillo's interview was the same crime about which defendant had previously refused to answer questions. However, the trial court also relied on *Warner*, which held that the defendant's confession was properly admitted under *Mosley*, even though the second interview was about the same crime. The *Warner* court explained that it was just one factor to be considered, because in *Mosley*, "[t]he real issue is whether defendant's *Miranda* right to cut off the questioning was respected in the totality of the circumstances." (*Warner, supra*, 203 Cal.App.3d at pp. 1130-1131.) As there was no evidence of police misconduct in *Warner*, or any attempt to persuade the defendant to change his mind, and the invocation occurred a substantial time (about 12 to 14 hours) prior to the second advisement of rights and the interview, the appellate court found that the defendant's rights were fully respected. (*Ibid.*)

Defendant argues that *Warner* is inapplicable, because there, the renewed *Miranda* warnings and subsequent interrogation were conducted by a detective who was ignorant of the first warnings and the defendant's initial refusal to be questioned. (See *Warner, supra*, 203 Cal.App.3d at p. 1125.)<sup>3</sup> In

---

<sup>3</sup> Defendant also contends that the second detective in *Mosley* was also unaware of the earlier warnings and invocation; however, the court stated that it was not clear from the record how much the second detective knew about the earlier interrogation, but noted that confining his questions to the murder was consistent with the defendant's earlier refusal to

*Warner*, however, admissibility did not turn on the second detective's ignorance of prior warnings; it was just one factor the appellate court considered in finding an absence of any evidence of police misconduct. (*Id.* at p. 1130.) We reject defendant's narrow view and his consideration of only the two circumstances he has asserted here. We agree with *Warner* that admissibility presents a factual issue to be determined from the *totality* of the circumstances. (*Warner*, at p. 1129; see *Mosley*, *supra*, 423 U.S. at p. 104.)

Here, just as in *Warner*, there was an absence of police misconduct; there was no indication that anyone pressured defendant, tried to "wear down" defendant's resistance, or 'browbeat' him into submission, or used any form of force or coercion or threatened him or made promises to him, or resumed questioning only a short time after he had invoked his rights, or that there was any kind of collusion among the officers." (*Warner*, *supra*, 203 Cal.App.3d at p. 1130.) Considering the absence of any such misconduct with the immediate cessation of interrogation after the first warnings and invocation, the resumption of questioning after the passage of a significant period of time, and the provision of a fresh set of warnings, we conclude, as the *Warner* court did, that "the circumstances meet the factual test of *Mosley*." (*Warner*, at p. 1131.)

Defendant asserts that Detective Camarillo was "overzealous" and that she went to defendant's cell "to initiate a conversation in the hopes that he would waive the rights he had previously exercised." The record suggests that Detective

---

answer questions about the unrelated robberies. (*Mosley*, *supra*, 423 U.S. at p. 105 & fn. 11.)

Camarillo did not initiate a conversation, rather she merely introduced herself. And whatever Detective Camarillo hoped would come from the contact, she did not express those thoughts to defendant. Evidence of the detective's unexpressed thoughts and beliefs would be relevant only to her credibility. (Cf. *People v. Stansbury*, *supra*, 9 Cal.4th 824.) Here, the trial court expressly believed Detective Camarillo's testimony, and we accept the trial court's credibility determination as it is substantially supported by the record, (see *People v. Bradford* (1997) 14 Cal.4th 1005, 1033) specifically, by the evidence that there was no questioning after defendant invoked his right to remain silent, and then a substantial amount of time passed before the recorded interview. Detective Camarillo also provided defendant with a fresh set of warnings, which after he said he understood, she asked, "Do you want to speak with me about what happened or about what you know?" Defendant had ample opportunity to refuse to be questioned a second time. In sum, there was no evidence that Detective Camarillo was *overzealous*. The *Miranda* safeguards were not meant to create "irrational obstacles to legitimate police investigative activity." (*Mosley*, *supra*, 423 U.S. at p. 102.) We conclude from all the circumstances that defendant's "'right to cut off questioning' was fully respected in this case" (*id.* at p. 104), and thus that the trial court did not err in denying defendant's motion.

Defendant further argues that the issue of penetration was not overwhelming, and the jury might have convicted him of the lesser offense of sexual battery if the confession had not been admitted. To demonstrate, defendant summarizes defense counsel's closing arguments on that issue, and argues that the jury's doubt about penetration is reflected in its request for the

“Information concerning the AP [acid phosphatase] test and the ability to detect vaginal fluid,” and “the transcript for when the menses began and ended.” He posits that without the confession, the jury might have been persuaded by defense counsel’s argument that Brittany was mistaken about penetration.

We disagree. Any confusion about the AP test was likely caused by defense counsel’s mischaracterization of the evidence in closing argument, when she stated that defendant’s finger was “not inside her vagina, because the swab came back negative for that enzyme. That enzyme is found in the vaginal fluid.” The record does not reflect what testimony was read back to the jury, however the testimony regarding the AP enzyme test would not have contributed to any doubt about penetration. Criminalist Thanh-Nhan Do testified that the swabs of defendant’s fingernails were not subjected to this test. Moreover, she explained that the test finds an enzyme in *semen*, and is found in vaginal fluids *only* if semen is also present. She testified that when there is no semen in the swab, a positive test for vaginal fluid would be a false positive.

Furthermore, although neither Brittany nor Nurse Drummey testified as to the precise date that Brittany’s menstruation ended, Drummey explained that the menstrual blood found was located three or four inches into the vagina, and Brittany’s *acute* injuries were actively bleeding on the border of her clitoral hood and the labia minora.

Even without defendant’s confession, the evidence of digital penetration was overwhelming. In her testimony, Brittany described the penetration, which was accomplished after defendant forced his hand into her underwear: “He just continued to be really aggressive. And my legs were closed really

tight. And he forced himself and started fingering me or trying to.”

The recording of the 911 call also supports Brittany’s testimony that defendant digitally penetrated her vagina. Brittany testified that when a car pulled up and flashed its headlights, defendant pulled out his fingers and ran off. The 911 recording began before defendant ran, and Brittany can be heard saying, “Ow. Get off me. Oh my god.” After a short explanation of what happened, Brittany tells the operator that he is running toward Hollywood Boulevard.

Brittany also testified that prior to the assault, she had no injuries to her vaginal or genital area, that her menstrual period occurred a week earlier, and that it had ended. Brittany told Drummey that her assailant had digitally penetrated her vagina, and the examination showed an actively bleeding laceration on the border of Brittany’s clitoral hood and the labia minora, with bruising and tenderness in the same area. Only old blood and the blood at the cervix was menstrual blood. Drummey testified that Brittany’s injuries were consistent with Brittany’s history and description of the events, thereby corroborating Brittany’s testimony.

Finally, DNA evidence supported a finding that defendant digitally penetrated Brittany’s vagina, as her DNA was found on a swab taken from defendant’s fingernail. Although the DNA analyst could not definitively say what part of the body Brittany’s DNA came from, he testified that it most likely came from bodily fluids in the vagina.

We agree with respondent that if erroneous, the admission of the confession was harmless under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24.) We conclude beyond a

reasonable doubt that if the confession had been suppressed,  
defendant would not have achieved a different result at trial.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT